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Supreme Court, U.S.
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No. (1)

IN THE

Supreme Court of the United States

PETER J. DAMON AND JENNIFER DAMON,

Petitioners,

v.

MICHAEL MOORE, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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Dated: June 19, 2008

BATEMAN & SLADE, INC BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

1. Can a Court, when applying state defamation law, disregard the rights and responsibilities of an active serviceman in the United States Military during time of war?

2. Did Respondents' non-consensual use of an active serviceman's name and image in an anti-war, anti-commander in chief documentary that was nationally and internationally distributed contravene the rights and responsibilities under the Uniform Code of Military Justice and invade the realm of protection under state defamation law?

PARTIES TO THE PROCEEDING

The following individuals were Plaintiffs in the District Court and Appellants in the Court of Appeals, and are Petitioners here: Peter J. Damon and Jennifer Damon. The following individuals were Defendants in the District Court and Appellees in the Court of Appeals, and are Respondents here: Michael Moore, Harvey Weinstein and Robert Weinstein. The following entities were Defendants in the District Court and Appellees in the Court of Appeals, and are Respondents here: Miramax Film Corp., The Fellowship Adventure Group LLC, Lions Gate Films Inc., IFC Films LLC, Showtime Networks Inc., Cinemanow, Inc. Westside Productions Inc., and National Broadcasting Company, Inc.

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OPINIONS BELOW

The order of the United States Court of Appeals for the First Circuit affirming the dismissal of Petitioners' complaint pursuant to Fed. R. Civ. P. 12(b)(6) is reported at 520 F.3d 98 (1st Cir. 2008) and is reprinted in the Appendix to the Petition ("B") at 2a. The order of the United States District Court for the District of Massachusetts dismissing the Petitioners' complaint pursuant to Fed. R. Civ. P. 12(b)(6) is not reported and is reprinted at A: 1a.

JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit was entered March 21, 2008. No petition for rehearing en banc was submitted. This Court has diversity jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

The First Amendment, U.S. Constitution: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."

STATUTORY PROVISIONS

10 U.S.C. Section 654 (a) Findings – "Congress makes the following findings:...

(6) Success in combat requires military units that are characterized by high morale, good order and discipline, and unit cohesion.

(7) One of the most critical elements in combat capability is unit cohesion: that is, the bonds of trust among individual service members that make the combat effectiveness of a military unit greater than the sum of combat effectiveness of the individual unit members.

(8) Military life is fundamentally different from civilian life in that –

(A) the extraordinary responsibilities of the armed forces, the unique conditions of military service, and the critical role of unit cohesion require that the military community, while subject to civilian control, exist as a specialized society; and

(B) the military society is characterized by its own laws, rules, customs, and traditions, including numerous restrictions on personal behavior, that would

not be acceptable in civilian society.

(9) The standards of conduct for members of the armed forces regulate a member's life for 24 hours each day beginning at the moment the member enters military status and not ending until that person is discharged or otherwise separated from the armed forces.

(10) Those standards of conduct, including the Uniform Code of Military Justice, apply to a member of the armed forces at all times that the member has a military status, whether the member is on base or off base, and whether the member is on duty or off duty..."

10 U.S.C. Section 892 (Article 92, UCMJ) – "Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties;

shall be punished as a court-martial may direct.

10 U.S.C. Section 934 (Article 134, UCMJ) – "Though not specifically mentioned in this chapter, all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty, shall be taken cognizance of by a general, special, or summary court-martial, according to the nature and degree of the offense, and shall be punished at the discretion of that court."

STATEMENT

A. Introduction

Peter Damon, an injured American serviceman, has unconscionably been deprived of a legal remedy to restore his reputation, meaningfully disassociate, and distinguish himself from Michael Moore's documentary "Fahrenheit 9/11" and thereby been damaged in the eyes of his peers in the military and veteran communities, his children and grandchildren, and history. In Gertz v. Welch, 418 U.S. 323, 341, 94 S. Ct. 2997 (1974), this Court recognized that a private individual's right to protection of his reputation "reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." Gertz v. Welch, 418 U.S. at 341, 94 S. Ct. at 3008, (quoting Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S. Ct. 669, (1966) (J. Stewart, concurring opinion). While the protection of private personality is primarily left to

the individual States, "this does not mean that the right [to the protection of his own good name] is entitled to any less recognition by this Court as a basic of our constitutional system." Id. It also does not mean that rights and responsibilities assumed and imposed upon Mr. Damon under the Uniform Code of Military Justice can be disregarded when applying state defamation law.

This case is extraordinary in that the decisions below confirm a disregard of the private individual's right to protection of his reputation in the military and veteran communities to which he belongs. This Court is called upon to direct the Courts to consider rights and responsibilities under the Uniform Code of Military Justice when applying state defamation law. Here, Michael Moore's anti-war, anti commander-in-chief documentary which was nationally and internationally distributed during the time of war, incorporated Peter Damon's name and image without consent. The media Respondents not be permitted to thrust military personnel into a commercial film attacking the President of the United States in a fashion that is defamatory to such military personnel and contrary to the rules, customs, and traditions of the United States Military without the possibility of civil liability. Preservation of "the root of any decent system of ordered liberty" turns on the Court's resolution of the issue presented. Id.

B. Background of This Case

Petitioner Sgt. Peter J. Damon is a United States veteran of the Iraq War. While defending our country and the rights enjoyed by its citizens, Sgt. Damon lost his right arm near the shoulder and his left arm above the wrist when a tire on a Black Hawk helicopter exploded on October 21, 2003. Just ten days later, while awaiting surgery and heavily sedated at the Walter Reed Army Medical Center, an anesthesiologist asked Sgt. Damon to do an interview with Brian Williams of NBC Nightly News about the "new" pain blocker he had received in treatment at the hospital in Iraq a few days earlier. While heavily sedated, Sgt. Damon consented to the interview for this sole purpose and use. At no point in time prior to, at, or after the interview did Sgt. Damon consent to the use or publication of the NBC Nightly News clip in a subsequent broadcast for any purpose. Sgt. Damon never signed a release authorizing the use or publication of that interview in any other context or in any other media communication. Respondents never even bothered to ask Sgt. Damon for his consent to use the footage in any other context. This fact has not been disputed by any party to this litigation.

The NBC Nightly News clip was broadcast by NBC Nightly News as part of its evening news program. In the NBC Nightly News clip, the following colloquy was broadcast:

BRIAN WILLIAMS: Sergeant, how are you doing?

SERGEANT PETER DAMON: Pretty good.

CORP. NELSON: The stories get more wrenching from room to room. Sergeant Peter Damon from Brockton, Massachusetts lost both arms.

SERGEANT PETER DAMON: Like I still feel like I have hands.

CORP. NELSON: Yeah.

SERGEANT PETER DAMON: And the pain is like my hands are still being crushed in a vice. But they do a lot to help it. And they take a lot of the edge off of it. And it makes – makes it a lot more tolerable, you know, so I can just be a lot more comfortable. I – I can't imagine not having them. (R. 18-19).

In the NBC Nightly News clip, the following additional statement was broadcast:

> BRIAN WILLIAMS: And one more thing, if you're looking for anti-war sentiment, you won't find it on Ward 57 of Walter Reed. These men, with catastrophic wounds are, to a man, completely behind the war effort. In fact, many want to go back. They miss their units and they miss their buddies. It is hard to look at their wounds sometimes. It is impossible not to admire their bravery. (emphasis added) (R. 19).

Eight months later, in June of 2004, Respondents released the commercial film "Fahrenheit 9/11". In "Fahrenheit 9/11", Respondent Michael Moore presents a two hour statement against the war aims of the United States and the President. Michael Moore, lacking any authority whatsoever, included in his anti-war anti-commander-in-chief documentary communication the interview previously conducted between Plaintiff, Peter Damon, and Brian Williams of NBC Nightly News. The portrayal sought to capture the tragedy of and pathetic state Peter Damon was physically in. He is shown in a shower cap and hospital gown, tubes coming out of him and obviously missing arms and hands. Michael Moore's presentation of the interview was craftily edited to remove Brian Williams. This inherently changed the meaning of Mr. Damon's appearance, especially when juxtaposed against the comments which

precede and follow Mr. Damon's statements. Conspicuously omitted from the segment of the interview manipulated by Michael Moore is any identification that Mr. Williams is the person conducting the interview. There is no mention of the statements made by Mr. Williams that unequivocally portray Mr. Damon as a supporter of the war effort, and which rightfully admire his brave character. There is also no mention of the beneficial "new" pain blocker that Mr. Damon was requested to comment on. Rather, Mr. Moore's version aligns Mr. Damon with Moore's own anti-war, anti-commander-in-chief message.

The film version is as follows:

Moore: While Bush was busy taking care of his base and professing his love for our troops, he proposed cutting combat soldiers' pay by 33% and assistance to their families by 60%. He opposed giving veterans a billion dollars more in health care benefits and he supported closing veteran hospitals. He tried to double the prescription drug costs for veterans and opposed full benefits for part-time reservists. And when Staff Sergeant Brett Petriken from Flint was killed in Iraq on May 26th, the army sent his last paycheck to his family, but they docked him for the last five days of the month that he didn't work because he was dead.

Rep. McDermott: They say they're not gonna leave any veteran behind, but they're leaving all kinds of veterans behind.

(Video of Walter Reed Army Medical Center)

VETERAN (in wheelchair): To say that we're forgotten – I know we're not forgotten. But missed?

Yes. Yes, you know there's a lot of soldiers that have been missed, you know, they've been skipped over. Um, that didn't get the proper coverage that they deserve.

VETERAN: They have the death toll but they're not showing the amount of people that have been injured and been amputated because of the injuries, you know.

(Video of Peter Damon)

SUBTITLE: Nearly 5,000 soldiers wounded in the first 13 months of the war

DAMON: Like I still feel like I have hands.

VOICE: Yeah.

DAMON: And the pain is like my hands are being crushed in a vice. But they do a lot to help it and they take a lot of the edge off of it. And it, it, it just makes it a lot more tolerable.

In addition, before the video of Peter Damon is shown, Col. Abdul Henderson is interviewed. When questioned about whether he would deploy if called to another tour of duty in Iraq Col. Henderson says, "No". Col. Henderson is questioned in uniform. Quite obviously Moore sought to promote disloyalty and disaffection as the desired effect.

It is the combination of manipulated text itself and its juxtaposition within the text of Michael Moore's anti-war, anti-commander-in-chief message, that Peter Damon was defamed in the military and veteran communities he so cherished, and to which

he belongs, causing them to believe he supported the anti-war message in the film in violation of the rights and responsibilities under the Uniform Code of Military Justice.

At the time of the film's release and continuing until February 2005, Sgt. Damon was in active military service bound by the Uniform Code of Military Justice, Department of Defense Directives, as well as the attendant customs and traditions of United States Military. See, 10 U.S.C. §654(a)(9). The Uniform Code of Military Justice forbids military members from making anti-war, anti-commander-in-chief statements and the Department of Defense Directives expressly prohibit participation by military members in any television or other program advocating for or against a political party, candidate or cause. See, 10 U.S.C. §§892, 934; DoD Directive, 1344.10, Political Activities by Members of the Armed Forces", August 2, 2004 at E3.3.8. The Court of Appeals expressly found a reasonable viewer could find the film espouses an "anti-war, anti-commander-in-chief' message. Thus, while civilians such as Respondents may have the luxury of sitting at home on their couches making such statements without consequence, active military members, who actually fight for this country's freedoms, like Mr. Damon, so that people like Mr. Moore can enjoy such privilege, cannot lawfully engage in any such activity.

The meaning associated with Peter Damon's appearance in the Brian Williams interview simply cannot be equated with that in Moore's "Fahrenheit 9/11". As noted, conspicuously omitted from the Moore appearance is Mr. Williams' concluding statement: "if you're looking for anti-war sentiment you won't find it on Ward 57 of Walter Reed. These

men with catastrophic wounds are to a man, completely behind the war effort." In addition to the manipulated text of Mr. Damon's appearance, in today's fame driven culture, no reasonable viewer would believe that Sgt. Damon did not voluntarily associate with Respondent Moore and his anti-war, anti-commander-in-chief documentary, nor would they believe that he did not benefit from his appearance in the film or that his interview did not originate with Moore. There are no verbal or visible disclaimers anywhere which would have alerted or informed the viewing public otherwise. What was originally a newsworthy segment about a "new" pain blocker and the unyielding bravery and sacrifice of our service personnel has been reduced to a manipulated, manufactured version susceptible to a defamatory meaning never intended, authorized, consented to and injurious to Sgt. Damon.

Respondents' conduct in manipulating and using the subject footage in this deceitful and unauthorized manner and context is violative of state defamation law when judged on the rights and responsibilities of an active serviceman under the Uniform Code of Military Justice during time of war. It is against the full backdrop that Sgt. Peter Damon seeks to reclaim his wrongfully tarnished reputation in the military and veteran communities and to preserve his legacy in the eyes of his children, grandchildren and history. He petitions this Court for certiorari to hear this important appeal.

REASONS FOR GRANTING THE WRIT

A private individual's right to protection of his reputation "reflects no more than our basic concept of the essential dignity and worth of every human being – a concept at the root of any decent system of ordered liberty." Gertz v. Welch, 418 U.S. 323, 341, 94 S. Ct. 2997, 3007 (1974) (quoting Rosenblatt v. Baer, 383 U.S. 75, 92, 86 S. Ct. 669 (1966) (J. Stewart, concurring opinion). While under the Federal Constitution, states can not, through their court systems and resultant case law, be permitted to destroy the necessary balance between the freedom of expression and the right of a private individual to preserve his reputation. Here, the Uniform Code of Military Justice imposes rights and responsibilities. This Court cannot permit the states to trample "the root of any decent system of ordered liberty" by protecting the media Respondents' reckless and intentional conduct herein at Sgt. Damon's reputation should not have been damaged by portraying him as supporting an antiwar, anti-commander in chief message. Id.

The military, like other professional groups, such as doctors, lawyers or judges, have a standard of judgment of their colleagues which is peculiar to their profession which differs sharply from the appraisal of the uninitiated." Kelly v. Loew's Inc., 76 F.Supp. 473, 496 (D.Mass. 1948). The military is truly a separate society in the sense of its specialized professional knowledge, traditions, ethical standards, and self-regulatory rules and procedures. See, 10 U.S.C. §654(a)(6)-(10). Sharp distinctions between permissible conduct in the civilian and the military communities have long been recognized by the courts. See, e.g., Middendorf v. Henry, 425 U.S.

25, 38-39, 96 S. Ct. 1281 (1976) (much broader range of conduct governed by military code). The military is a "specialized community governed by a separate discipline from that of the civilian," which has developed customs and usages that impart meaning to "seemingly imprecise" standards. Parker v. Levy, 417 U.S. 733, 746-47, 94 S. Ct. 2547, 2556 (1974). Moreover, "[t]he military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.... The essence of military service 'is the subordination of the desires and interests of the individual to the needs of the service.'" Goldman v. Weinberger, 475 US 503, 507, 106 S. Ct. 1310 (1986) (citations omitted).

Military members are governed by the Uniform Code of Military Justice ("Military Code"). In pertinent part, the Uniform Code of Military Justice, prohibits "disloyal statements" and expressly bars "attacking the war aims of the United States." See, Manual for Courts-Martial, Section 72, Article 134 – (Disloyal Statements) (c) (emphasis supplied); see also, Parker v. Levy, 417 U.S. 733, 752, 94 S. Ct. 2547, 2560 (1974). "Disloyal statements" are to be interpreted in the totality of the context of the circumstances in which they are presented. U.S. v. Harvey, 1970 WL 7022 (CMA), 42 C.M.R. 141, 145-46, 19 U.S.C.M.A. 539, 543-44 (1970). citing, Watts v United States, 394 U.S. 705, 89 S. Ct. 1399 (1969). In resolving the issue as though there was no kinship between Sgt. Damon's belief and the message being conveyed in Moore's anti-war, anti-commander-in-chief film, the Court disregarded the rights and responsibilities of an

active serviceman under the Uniform Code of Military Justice (as well as DoD Directives)

For Respondents to force an involuntary and non-consensual "role" upon active military personnel, such as Sgt. Damon, during time of war in a film which has a defamatory meaning running contrary to their professional oath, ethics, rules, customs and traditions is violative of state law. It was Respondent Moore who took his own views and presented them as fact to the nation, using identifiable active military personnel as props to make his point, and it is Respondents who benefited financially by distributing the film nationally and internationally who should now be answerable for such damages. Dismissal of this action is tantamount to a complete dismissal of an active serviceman's right to protection of his or her reputation as acknowledged by this Court in Gertz, supra, and Justice Stewart in Rosenblatt, supra.

The First Circuit's attempt to equate the involuntary appearance of a private individual, Sgt. Damon, with public officials, such as President Bush and Vice President Cheney, in its underlying decision so as to negate any possible defamatory implication by Damon's appearance in the film is contrary to this Court's prior decisions which recognize a distinction between these two classes. See, Gertz, supra; New York Times v. Sullivan, 376 U.S. 254 (1964). Moreover, as recognized by this Court, public officials "enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy" Gertz, supra at 323. Here, Peter Damon's only real channel to effectively preserve his legacy and salvage his reputation in the military and

veteran communities is via a legal action as anticipated in Gertz, supra.

Respondent Moore could easily have told his story without thrusting Sgt. Damon into the national and world-wide arena as part of his anti-war, anti-commander-in-chief agenda. Instead, Moore recklessly elected to proceed without even asking Sgt. Damon for his consent, and then utilized only an edited portion of the interview in a completely different context so as to give it meaning and import that was never intended. This affected Sgt. Damon's rights and responsibilities under the Uniform Code of Military Justice. As a result, in the context in which Sgt. Damon now appears a reasonable viewer in the military and veteran communities would forever associate Sgt. Damon with the film and its message; discern that Sgt. Damon consented to the use of his statement, interview, and appearance; and, conclude that the context in which he appears accurately reflects Sgt. Damon's views.

Freedom of expression is not absolute, completely unrestricted, or without accountability. Restrictions are and should be placed on freedom of expression where, as here, such expression is likely to cause significant harm to private individuals, particularly those who make great sacrifices defending our freedom. This Court is the ultimate interpreter of what the Constitution protects and what it does not protect. Sgt. Damon protected us and now, at the very least, he is entitled to protection of his reputation and protection from Respondents' repugnant capitalization on his life's most vulnerable moment.

CONCLUSION

Based upon the foregoing, Petitioners Peter J. Damon and Jennifer Damon respectfully pray that a writ of certiorari be issued in this case to allow an active serviceman to protect his reputation and be free from an unwarranted invasion of his unfettered right to life, liberty and the pursuit of happiness.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER J. DAMON ET AL
Plaintiff,

v. CIVIL ACTION
NO. 06-11532-DPW

MICHAEL MOORE ET AL
Defendant.

ORDER OF DISMISSAL

WOODLOCK, District Judge

In accordance with this Court's ruling on December 20, 2006, made in open court and reflected in the stenographer's notes, allowing the Defendants' motion to dismiss, it is hereby ORDERED that the above-entitled action be and hereby is DISMISSED.

BY THE COURT,

/s/ Michelle Rynne
Deputy Clerk

DATED: December 20, 2006

APPENDIX B

United States Court of Appeals
For the First Circuit

No. 07-1365

PETER J. DAMON; JENNIFER DAMON,

Plaintiffs, Appellants,

v.

MICHAEL MOORE; HARVEY WEINSTEIN; ROBERT WEINSTEIN; MIRAMAX FILM CORP.; THE FELLOWSHIP ADVENTURE GROUP, LLC.; LIONS GATE FILMS, INC.; IFC FILMS, LLC; SHOWTIME NETWORKS, INC.; CINEMANOW, INC.; WESTSIDE PRODUCTIONS LLC (sued as WESTSIDE PRODUCTIONS INC.); and NBC UNIVERSAL, INC. (sued as NATIONAL BROADCASTING CO., INC.),

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

[Hon. Douglas P. Woodlock, U.S. District Judge]

Before

Torruella and Howard, Circuit Judges,
and Delgado-Colón,* District Judge.

Donald J. Feerick, Jr., with whom Philip D. Moran and Feerick Lynch MacCartney PLLC, was on brief, for appellants.

Jonathan M. Albano, with whom Carol E. Head and Bingham McCutchen LLP, was on brief, for appellees.

March 21, 2008

DELGADO-COLÓN, District Judge. Plaintiff-appellant, Sergeant Peter J. Damon ("Damon"), a former Sergeant in the Army Reserves, appeals from the dismissal of his defamation claim stemming from the non-consensual use of an interview he conducted for NBC Nightly News ("NBC") in the documentary "Fahrenheit 9/11" ("documentary"). According to Damon, defendants-appellees ("Appellees"), and more specifically, Michael Moore ("Moore"), the creator, writer, director, producer and narrator of the documentary, portrayed Damon as supporting the documentary's anti-war and anti-Commander-in-Chief message by using and placing in the documentary, without his consent, a sixteen-second segment of an interview he previously conducted with NBC. In dismissing the defamation claim, the district court found that Damon's appearance in the documentary was not reasonably susceptible of a

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* Of the District of Puerto Rico, sitting by designation.

defamatory meaning/interpretation. For the following reasons, we affirm the dismissal.[1]

I. Factual Background

A. NBC Nightly News

Damon was an Army Reserve Sergeant who served in the National Guard's 126th Aviation Unit based at Camp Edwards on Cape Cod, Massachusetts. On October 21, 2003, while on active duty at the National Guard facility in Balad, Iraq, a tire on a Black Hawk helicopter exploded while he and another reservist were servicing the aircraft. As a result of the explosion, Damon lost his right arm near the shoulder and his left arm above the wrist; the Army reservist who was assisting Damon was killed. Following the incident, Damon was transported to Walter Reed Army Medical Center in Washington, D.C. ("Walter Reed"), where he was treated by Army medical personnel with a new pain blocker.

On October 31, 2003, while Damon was awaiting surgery, an anesthesiologist asked him to do an interview with Brian Williams of NBC about the new pain blocker. Although heavily sedated, he agreed to the interview. In the NBC clip, Damon appears on the screen for less than thirty seconds, speaking to an interviewer regarding the new pain blocker with his injured arms in bandages. The interview consisted of the following colloquy:

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[1] While the complaint contained, and the District Court dismissed, numerous other causes of action, the only issue before us is the dismissal of Damon's defamation claim.

Brian Williams: Sergeant, how are you doing?

Damon: Pretty good.

Corp. Nelson: The stories get more wrenching from room to room. Sergeant Peter Damon from Brockton, Massachusetts, lost both arms.

Damon: Like I still feel like I have hands.

Corp. Nelson: Yeah.

Damon: And the pain is like my hands are being crushed in a vice. But they do a lot to help it. And they take a lot of the edge off of it. And it makes – makes it a lot more tolerable, you know, so I can just be a lot more comfortable. I – I can't imagine not having them.

* * *

Brian Williams: And one more thing, if you're looking for anti-war sentiment, you won't find it on Ward 57 of Walter Reed. These men, with catastrophic wounds are, to a man, completely behind the war effort. In fact, many want to go back. They miss their units, and they miss their buddies. It

> is hard to look at their wounds sometimes. It is impossible not to admire their bravery.

NBC aired Damon's interview as part of its evening news broadcast.

B. The Documentary

While Damon consented to the NBC interview and subsequent broadcast, he neither consented to the use of the interview in another broadcast, nor was he ever advised that Appellees were considering using his interview for anything other than the original broadcast. Notwithstanding, Moore was allowed to place Damon in the documentary.

The allegedly defamatory portion of the documentary contains the following statement:

Moore: While Bush was busy taking care of his base and professing his love for our troops, he proposed cutting combat soldiers' pay by 33% and assistance to their families by 60%. He opposed giving veterans a billion dollars more in health care benefits, and he supported closing veterans hospitals. He tried to double the prescription drug costs for veterans and opposed full benefits for part-time reservists. And when Staff Sargent Brett Petriken from Flint was killed in Iraq on May 26th, the Army sent his

last paycheck to his family, but they docked him for the last five days of the month that he didn't work because he was dead.

Rep. McDermott: They say they're not gonna leave any veteran behind, but they're leaving all kinds of veterans behind.

* * *

(Video of Walter Reed Hospital)

Veteran (in wheelchair) To say that we're forgotten – I know we're not forgotten. But missed? Yes. Yes, you know there's a lot of soldiers that have been missed, you know, they've been skipped over. Um, that didn't get the proper coverage that they deserve.

Veteran: They have the death toll but they're not showing the amount of people that have been injured and been amputated because of the injuries, you know.

Subtitle: (Nearly 5,000 soldiers wounded in the first 13 months of the war.)

Damon: Like I still feel like I have hands.

Voice: Yeah.

Damon: And the pain is like my hands are being crushed in a vice. But they do a lot to help it. And they take a lot of the edge off of it. And it makes – makes it a lot more tolerable.

According to Damon, the documentary was an attack upon the integrity of the Commander-in-Chief and the war effort, and it denounced the United States' military action in Iraq by, among other things, "attacking the credibility of the Commander in Chief of the United States Armed Forces about the justification for the war, its cost and consequences . . . ." Accordingly, Damon alleges that his unwitting appearance in the documentary falsely portrays him – and has been interpreted by members of the military and veteran communities – as sharing, adopting and endorsing Moore's attack on the President and the war effort.

II. Procedural Background

Damon brought suit in Superior Court of the Commonwealth of Massachusetts on May 26, 2006. On August 28, 2006, Appellees removed the case, on diversity grounds, to the United States District Court for the District of Massachusetts. Specifically, Damon sued for common law appropriation of name, portrait and picture; statutory right to privacy; defamation; intentional infliction of emotional distress; and loss of consortium. On October 6, 2006,

Appellees filed a motion to dismiss the complaint for failure to state a claim upon which relief could be granted or, in the alternative, for summary judgment. On December 20, 2006, after a hearing, the district court granted Appellees' motion to dismiss on all counts. This appeal followed.

III. Analysis

A. Standard of Review

We review the district court's decision to dismiss de novo. Stanton v. Metro Corp., 438 F.3d 119, 123-24 (1st Cir. 2006) (citing SFW Arecibo, Ltd. v. Rodríguez, 415 F.3d 135, 138 (1st Cir. 2005)). In so doing, we accept as true the well-pleaded factual allegations of the complaint, drawing all reasonable inferences in favor of the non-moving party. Id. at 124.

The Supreme Court recently clarified the law with respect to a plaintiff's pleading requirement in order to survive a Rule 12(b)(6) motion. Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955 (2007). In Twombly, the Court stated that "a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." Id. at 1964-65 (internal citation and quotation marks omitted). Further, the Court explained that the "[f]actual allegations must be enough to raise a right to relief above the speculative level on the assumption that all the allegations in the complaint are true." Id. at 1965 (internal citations omitted). In so doing, the Court retired the oft-cited language of Conley v. Gibson, 355 U.S. 41, 45-46 (1957), that "a complaint should not be dismissed for failure to state a claim unless it

appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief", characterizing it as one "best forgotten as an incomplete, negative gloss on an accepted pleading standard." Twombly, 127 S. Ct. at 1969. Nevertheless, as explained below, our disposition of Damon's claim does not depend upon the nuances of Twombly's effect on the dismissal standard.

B. Defamation Claim

Damon argues that the district court erroneously failed to conclude that his non-consensual appearance in the documentary was reasonably capable of a defamatory meaning in the military and veteran communities to which he belongs. More specifically, Damon contends that his appearance in the documentary portrays him as endorsing the political views of Moore; views that are contrary to his own and repugnant in the military and veteran community.

To prevail on a defamation claim "under Massachusetts law, a plaintiff must show that the defendant was at fault for the publication of a false statement of and concerning the plaintiff which was capable of damaging his or her reputation in the community, and which either caused economic loss or is actionable without proof of economic loss."[2] Stanton, 438 F.3d at 124; Amrak Prods., Inc. v.

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[2] Four types of statements are actionable without proof of economic loss: (1) statements that constitute libel; (2) statements that charge the plaintiff with a crime; (3) statements that allege that the plaintiff has certain diseases; and (4) statements that may prejudice the plaintiff's profession or business. Ravnikar v. Bogojavlensky, 438 Mass. 627, 630, 782 N.E.2d 508, 511 (2003).

Morton, 410 F.3d 69, 72 (1st Cir. 2005); White v. Blue Cross & Blue Shield of Mass., Inc., 442 Mass. 64, 66, 809 N.E.2d 1034, 1036 (2004); Bogojavlensky, 438 Mass. at 629-30, 782 N.E.2d at 510; Brauer v. Globe Newspaper Co., 351 Mass. 53, 55, 217 N.E.2d 736, 738 (1966). The court is not called upon to determine the ultimate issue of whether the statement is defamatory, but to answer the "threshold question" of "'whether [the] communication is reasonably susceptible of a defamatory meaning.'" Amrak, 410 F.3d at 72 (quoting Phelan v. May Dep't Stores Co., 443 Mass. 52, 56-57, 819 N.E.2d 550, 554 (2004)). A communication is susceptible to defamatory meaning if it would tend to injure the plaintiff's reputation, or "hold the plaintiff up to scorn, hatred, ridicule or contempt, in the minds of any considerable and respectable segment in the community." Id. at 72 (quoting Phelan, 443 Mass. at 56, 819 N.E.2d at 553) (internal quotation marks omitted); see also Milgroom v. News Group Boston, Inc., 412 Mass. 9, 12, 586 N.E.2d 985, 988 (1992); Smith v. Suburban Rests., Inc., 374 Mass. 528, 529, 373 N.E.2d 215, 217 (1978); Stone v. Essex County Newspapers, 367 Mass. 849, 853, 330 N.E.2d 161, 165 (1975).[3] In determining whether a statement is susceptible to defamatory meaning, "[t]he communication 'must be

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[3] Accordingly, words may be actionable even if they do not damage a plaintiff's reputation or hold him up to ridicule in the community at large or among all reasonable people; it is enough that they do so among a considerable and respectable class of people. Sharratt v. Housing Innovations, Inc., 365 Mass. 141, 145, 310 N.E.2d 343, 346 (1974). Likewise, inferences which may be drawn by a considerable and respectable segment of the community can make a statement or publication actionable. Mabardi v. Boston Herald-Traveler Corp., 347 Mass. 411, 414, 198 N.E.2d 304, 306 (1964).

interpreted reasonably,'" and can only be ruled defamatory if it would lead "a 'reasonable reader' to conclude that it conveyed a defamatory meaning." Amrak, 410 F.3d at 72 (citing Foley v. Lowell Sun Publ'g Co., 404 Mass. 9, 11, 533 N.E.2d 196, 197 (1989)); see also Stanton, 438 F.3d at 127; Restatement (Second) of Torts § 563 cmt. c (1977). However, "[w]here the communication is susceptible of both a defamatory and non-defamatory meaning, a question of fact exists for the jury." Jones v. Taibbi, 400 Mass. 786, 792, 512 N.E.2d 260, 264 (1987).

Notwithstanding the apparent settled nature of the law of defamation in Massachusetts, the parties strongly disagree about its application. Damon contends that because he was a member of the armed forces, and is an active member of the military and veteran community, the Court must not apply the "reasonable" person standard, but instead must delve into the effect of the documentary upon his military brethren, who constitute a "considerable and respectable segment" of the community. See, e.g., Kelly v. Loew's Inc., 76 F. Supp. 473, 486 (D. Mass. 1948) ("[I]f the community or audience includes a professional group to which the subject of the statement belongs, the question is the effect of the statement upon that group with its special professional standards."); Sharratt, 365 Mass. at 145, 310 N.E.2d at 346 ("It would be anomalous at best if words clearly understood in a defamatory sense among that community should fail to be actionable merely because they would appear innocent to the general public."). For their part, Appellees argue that the Court is faced with two distinct questions of law: (1) whether a communication is capable of bearing the particular meaning ascribed to it by plaintiff; and (2) whether that meaning is defamatory. See Restatement

(Second) of Torts § 614; see also Phelan, 443 Mass. at 56-57, 819 N.E.2d at 554 (citing the Restatement). The main thrust behind this argument is that while standards applied from the viewpoint of professional groups may be relevant to the second inquiry, they have no bearing on the Court's determination of whether a communication is capable of bearing the particular meaning ascribed to it by plaintiff. Restatement (Second) of Torts § 614 cmt. d. While both positions are ably argued, pursuant to established precedent, Damon would prevail if he could show that his appearance and statement in the documentary was reasonably susceptible to a defamatory meaning in the eyes of either the community as a whole or that of the military or veteran community to which he belongs. See Stanton, 438 F.3d at 124; Sharratt, 365 Mass. at 145, 310 N.E.2d at 346.

1. Reasonable Viewer Analysis

We first determine whether Damon's placement in the documentary may reasonably be viewed as discrediting Damon in the minds of any considerable and respectable class of the community to which the statement was addressed. See Amrak, 410 F.3d at 72. As we have repeatedly held, the statement must be viewed "'in its totality in the context in which it was uttered or published'" and "'consider[ing] all the words used, not merely a particular phrase or sentence.'" Id. at 73 (quoting Foley, 404 Mass. at 11, 533 N.E.2d at 197); see also Restatement (Second) of Torts § 614 cmt. d ("[T]he context of written or spoken words is an important factor in determining the meaning that they reasonably might convey to the person who heard or read them."). In making this determination, we must

view Damon's interpretation of the communication reasonably, and can only rule that it is defamatory if it could lead "a reasonable [viewer] to conclude that it conveyed a defamatory meaning." Amrak, 410 F.3d at 72; see also Stanton, 438 F.3d at 125; Foley, 404 Mass. at 11, 533 N.E.2d at 197; Restatement (Second) of Torts § 563 cmt. c. Forced or strained construction of the statement will not suffice to state a claim for defamation. King v. Globe Newspaper Co., 400 Mass. 705, 711-12, 512 N.E.2d 241, 245 (1987). "[T]he words are to be read in their 'natural sense with the meaning which they would convey to mankind in general.'" Joyce v. George W. Prescott Publ'g Co., 348 Mass. 790, 790, 205 N.E.2d 207, 207 (1965) (quoting Lyman v. New England Newspaper Publ'g Co., 286 Mass. 258, 260, 190 N.E. 542, 543 (1934)).

Here, Damon appears in the documentary during a segment that discusses the treatment of wounded veterans by the administration of President George W. Bush. During the introductory remarks, Moore harshly criticizes President Bush for allegedly failing to deliver on his public statements of support for the troops, citing, among other things, his Administration's proposals to cut combat pay and veteran benefit programs. Immediately following the introduction, Congressman Jim McDermott of Washington State appears on screen and states: "They say they're not gonna leave any veteran behind, but they're leaving all kinds of veterans behind." Following Congressman McDermott, two veterans appear on screen, neither of whom makes any remark which could be construed as critical of the President or the war aims of the United States. Instead, the first veteran is critical of the medical coverage or treatment some veterans have received upon their return home, and the second veteran

appears to be commenting on either the government's and/or the media's failure to disclose the number of injured soldiers. A roughly sixteen-second portion of Damon's NBC interview follows in which he talks exclusively about the pain he is suffering due to his injuries, and the effectiveness of his pain treatment. Looking at the documentary from this micro-level, there is no way for a reasonable viewer to construe Damon as supporting Moore's "agenda." Neither may it be reasonably construed as a statement promoting disloyalty or denouncing either the Commander-in-Chief or the medical treatment received by veterans.

Stepping back from Damon's segment and viewing the documentary as a whole, we are compelled to conclude, as the district court did, that a reasonable viewer could not construe Damon's appearance as supportive of Moore's message. The overall context of the documentary, along with its theme, text, visual images, sounds and release date, while understandably upsetting to Damon, does not propel his otherwise benign interview into one reasonably susceptible of defamatory meaning. See, e.g., Lasky v. Am. Broad. Cos., Inc., 631 F. Supp. 962, 970 (S.D.N.Y. 1986) ("In studying a television program for . . . defamatory meanings, a court must not confine its analysis to the words alone. . . . It is the entirety of the program, both audio and video, that must be considered in determining whether . . . [it] is reasonably susceptible of a defamatory meaning.").[4]

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[4] It bears noting that Damon's appearance in the documentary is essentially the same as his appearance in the NBC broadcast, an interview Damon concedes is not defamatory. After reviewing both programs, the obvious difference is the deletion of Brian Williams' closing remarks wherein he

Viewing the documentary as a whole, it is clear that Damon is one of approximately fifty individuals whose interviews were taken out of their original packaging and inserted into the documentary in order to further Moore's message. Damon's role comprises sixteen seconds of a roughly two-and-a-half-hour documentary. He appears in a segment with two other veterans, none of whom convey any anti-war sentiment. While a reasonable viewer could conclude that the documentary itself espouses an anti-war and anti-Commander-in-Chief message, no viewer could reasonably conclude that Damon shares any political or ideological kinship with Moore. The only message such viewer could reasonably take away from the documentary regarding Damon is that he was a wounded veteran, and that the treatment he was receiving at Walter Reed was effective in combating the pain caused by his injuries. We endorse the district court's description of documentaries as "artistic undertakings that involve the collection of images brought to gather [sic] in one place for presentation" and its assessment that "there is nothing [in the documentary] that suggests that there is an endorsement of a willingness on [Damon's] part. It is simply a circumstance in which his image is used." It would be unreasonable to interpret the use of Damon's image as an affirmative adoption of Moore's view of the military and the President.

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explains that all members of Damon's hospital ward support the war. Notwithstanding this deletion, Damon's actual appearance in the NBC broadcast remains unchanged in the documentary. During the same, Moore did not manipulate the actual questions asked, or Damon's responses in such a way to convey a different meaning than when originally broadcast by NBC.

Moreover, Damon is not the only individual to appear in the documentary who does not support Moore's message. For example, President George W. Bush, Vice-President Richard B. Cheney and then Secretary of Defense Donald H. Rumsfeld appear in the documentary, and all, presumably, disagree with Moore's message. Numerous other individuals, including members of the military, who make no statement either way regarding their ideological beliefs concerning the President or the war aims of the United States, appear in the documentary. Because of this, no reasonable viewer could make the blanket assessment that an individual's appearance in the documentary is equivalent to being supportive of Moore's message. This is not a situation where the entire documentary consisted of like-minded individuals asserting a common position.

Based on the foregoing, we once again concur with the trial judge's finding that:

> [t]here is nothing that expressly or implicitly suggests that Mr. Damon knowingly associated with Mr. Moore's venture here. The reasons that people consent to interviews do not suggest endorsement of the views of the interviewer . . . . Circumstances in which people are interviewed on contentious matters suggest that people with strong views, or people with views that they would like to have communicated, frequently submit to interviews by people they wouldn't like very much or whose larger views they do not like very much. And one cannot say that that's defamation under the circumstances.

Accordingly, we are of the opinion that a reasonable viewer could not conclude that Damon's appearance in the documentary conveyed a defamatory meaning. Stanton, 438 F.3d at 127; Amrak, 410 F.3d at 72; Foley, 404 Mass. at 11, 533 N.E.2d at 197 (1989); Restatement (Second) of Torts § 563 cmt. c.[5]

2. Reasonable Military Viewer Analysis

Damon disagrees with the above analytical framework, and argues that the Court must determine what effect his appearance in the documentary has upon any respectable and substantial part of the community; and if the community or audience includes a professional group to which the subject of the statement belongs the question becomes what is the effect of the statement upon that group with its special standards. Kelly, 76 F. Supp. at 486; see also Sharratt, 365 Mass. at 145, 310 N.E.2d at 345 ("It would be anomalous at best if words clearly understood in a defamatory sense among the community should fail to be actionable merely because they would appear innocent to the general public.").[6] Military personnel, "like other

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[5] While not clearly articulated, Damon appears to argue that Moore needed to place a disclaimer informing viewers that Damon, and others, did not agree to appear in the documentary, and therefore, may or may not support its overall message. While disclaimers are not a bad practice, the non-defamatory character of a statement will rarely depend solely on the presence or absence of one. Stanton, 438 F.3d at 126.

[6] The Massachusetts Supreme Judicial Court in Ingalls v. Hastings& Sons Publ'g Co., explained the standard as follows:

> [A statement is defamatory] if, in view of all relevant circumstances, it discredits the

professional groups, such as doctors, lawyers or judges have a standard of judgment of their colleagues which is peculiar to their profession which differs sharply from the appraisal of the uninitiated." Kelly, 76 F. Supp. at 486. Thus, the question is whether Damon's appearance in the documentary would tend to injure Damon's reputation, or hold him up to scorn, hatred, ridicule or contempt, in the minds of the military or veteran community. Id. ("[T]he issue narrowly stated is whether to permanent officers of the United States Navy the portrayal of plaintiff as resembling [a movie character representing him] would tend to lower his reputation.").

It has long been recognized that the military is a specialized society separate and apart from civilian society. Parker v. Levy, 417 U.S. 733, 743 (1974); United States v. Mariea, 795 F.2d 1094, 1100 (1st Cir. 1986); Serrano Medina v. United States, 709 F.2d 104, 107 (1st Cir. 1983). This Court also recognizes that during its long history the military has, by necessity, developed laws and traditions of its own. Parker, 417 U.S. at 743. The differences between the military community and the civilian community, and between military law and civilian law, are exemplified by the Uniform Code of Military

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> plaintiff in the minds, not of the court, nor of wise, thoughtful and tolerant men, nor of ordinary reasonable men, but of any "considerable and respectable class in the community." The emotions, prejudices and intolerance of mankind must be considered in determining the effect of a publication upon the standing of the plaintiff in the community.

304 Mass. 31, 33, 22 N.E.2d 657 658-59 (1939) (internal citations omitted).

Justice ("Military Code"). The Military Code regulates aspects of the lives of military men and women which are left unregulated in the civilian sphere.[7] The making of a disloyal statement, which includes "attacking the war aims of the United States," is violative of the Military Code. Manual for Courts-Martial, United States, § 72, Art. 134.[8]

At the time the documentary was released, Damon was an active member of the military, and he continues to associate with military personnel and veterans to this day. It is within these communities that Damon claims he has been defamed. He alleges that his appearance, coupled with the documentary's overall theme, narrative and his placement in the documentary – shortly after another soldier explained that he would not return to Iraq if ordered – brands Damon as being a supporter of the documentary's agenda, denouncing the military operation that he and fellow military personnel served, denouncing the treatment of veterans and promoting disloyalty and disaffection to the United States. From this, Damon concludes that his appearance could lead the military community to reasonably conclude that he is making disloyal statements intended to promote disloyalty and

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[7] The Military Code regulates a far broader range of the conduct of military personnel than a typical state criminal code regulates of the conduct of civilians. Id. at 750.

[8] "Some statements may be so explicit in meaning as to support a conclusion from their language that they are disloyal to the United States. Other statements require interpretation; and their real nature may be discernible only in the context of the circumstances of their utterance. Words by themselves may not always reveal their character" United States v. Harvey, 19 C.M.A. 539, 542-44, 42C.M.R. 141, 145-46 (1970) (citing Watts v. United States, 394 U.S.705 (1969)).

disaffection toward the United States, the President and or the war effort. We disagree.

While it is clear that military and civilian communities may very well view certain situations, e.g. a soldier's refusal to return to battle, differently, this is not one of those situations. Taking the documentary as a whole, no reasonable member of the military or veteran community could possibly view Damon's appearance in the documentary as being disloyal to the United States. As explained above, Damon makes no statements in opposition to the war effort, nor was his interview manipulated in such a way to imply that he was "attacking the war aims of the United States." Id. In fact, as pointed out by the district court, the documentary's portrayal of Damon

> shows an individual who is discussing with great dignity and obvious pain what his participation in the conflict in Iraq has meant and not in any way suggesting that he thinks that his service was demeaned, but rather expressing his opinion that the medical treatment that he received has been something that helps to make his pain more livable

and that Damon's appearance "transcends the alternative views that others present there with . . . considerable dignity and no suggestion of disloyalty."

Moreover, unlike the cases cited by Damon,[9] he was not portrayed as denouncing the military,

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[9] See, e.g., Parker, 417 U.S. at 733 (defendant publicly urged enlisted personnel to refuse to obey orders which might send them into combat); Harvey, 19 C.M.A. at 539, 42 C.M.R. at

any of its war aims or the President. Instead, Damon spoke solely about his medical treatment after valiantly serving his country. Accordingly, there is no reason to believe that a reasonable member of the military or veteran community would conclude that Damon's appearance in the documentary conveyed a defamatory meaning, and therefore lowered his reputation or subjected him to scorn, hatred, ridicule or contempt in that community.

IV. Conclusion

While we appreciate Damon's anger and frustration over appearing without his consent in a documentary that stands in direct contrast to his own personal and political beliefs, we conclude that his appearance in the documentary is not reasonably susceptible of a defamatory meaning. We therefore affirm the district court's dismissal of Damon's defamation claim. Since Damon's appearance was not reasonably susceptible to a defamatory meaning under Massachusetts state law, we need not reach the question of whether being falsely labeled either pro- or anti-war, as a matter of law, holds a member of the military up to the type of scorn and ridicule required for a defamation claim. Furthermore, while we recognize the potential First Amendment implications of this case, since the claim fails as a matter of state law, we need not reach them.

Affirmed.

141(defendant's statements urged various Marines to refuse to fight in Vietnam).